No. [illegible]

MARY WAY KEMP [illegible], Petitioner,

v.

HOUSTON OIL COMPANY OF TEXAS, ET AL., Respondents.

RESPONDENTS' REPLY TO PETITION FOR CERTIORARI

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SUBJECT INDEX

	PAGE
STATEMENT OF THE CASE	1
REPLY TO JURISDICTIONAL GROUNDS RELIED ON BY PETITIONERS	3
CONCLUSION	10

LIST OF AUTHORITIES

CASES

	PAGE
Atchison, Topeka & Santa Fe Railway Co. v. Railroad Commission of California, et al., 283 U.S. 380, 390-391, 75 L. Ed. 1129, 1136	5
Behrens v. Behrens, 186 S.W. (2d) 695	8
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 680, 74 L. Ed. 1107, 1113	4
City of Chicago v. Robbins, 67 U.S. 418, 17 L. Ed. 289	10
Cooley v. Miller, et al., 228 S.W. 1058, 1086	7
Jergens v. Schiele, 61 Tex. 255	6
Kibbe v. Ditto, 93 U.S. 674, 23 L. Ed. 1005	10
Mexia v. Lewis, et al., 21 S.W. 1016	8
O'Connor v. Texas, 202 U.S. 501, 50 L. Ed. 1120	10
Senn v. Tile Layers Protective Union, 301 U.S. 468, 477, 81 L. Ed. 1229, 1235	5
Stark v. Hardy, et al., 29 S.W. (2d) 969, 969	9
Supreme Lodge, Knights of Pythias v. Meyers, 265 U.S. 30, 32, 68 L. Ed. 885, 888	4
Tyler v. United States, 281 U.S. 497, 74 L. Ed. 991	10
White v. Burnley, 61 U.S. 235, 251, 15 L. Ed. 886, 890	9

CONSTITUTION OF THE UNITED STATES

Article 14, Section 1	3

REVISED CIVIL STATUTES OF TEXAS

Article 5510	2

TEXTS

40 C. J. S. 431, Section 2	6
40 C. J. S. 433, Section 3	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 272

MARY WALL KIRBY, ET AL., *Petitioners,*

v.

HOUSTON OIL COMPANY OF TEXAS, ET AL., *Respondents*

RESPONDENTS' REPLY TO PETITION FOR CERTIORARI

Statement of the Case

Respondents are not able to concur fully in the STATEMENT as made by Petitioners. It omits certain features Respondents deem material and Respondents, therefore, submit the following:

Petitioners sued Respondents in trespass to try title seeking recovery of the mineral estate in and to 19 acres of land of the George W. Brooks League in Hardin County, Texas. As the surviving wife and heirs at law of Dr. H. S. Kirby, deceased, Petitioners claim title through a deed from W. S. Frazier and wife L. J. Frazier to Dr. Kirby of date August 2, 1904 (R. 17-18). No record or paper title to the mineral

estate involved was shown in Frazier and wife, it being Petitioners' contention that such parties had title by virtue of Article 5510 of the REVISED CIVIL STATUTES OF TEXAS, the ten-year limitation statute.

There was evidence that in 1873 or 1874 Frazier and wife moved upon the Brooks League and in 1884 he caused 160 acres, including the 19 acres here involved, to be surveyed and marked on the ground and asserted claim thereto.

In 1896 W. S. Frazier brought suit in trespass to try title against Texas Pine Land Association, the owner of the land, for the 160 acres he was claiming. He specifically pleaded the provisions of Article 5510, R. C. S. On September 26, 1899, judgment was rendered and entered in such suit whereby it was decreed that Frazier "take nothing" and that Texas Pine Land Association, on its cross-action, recover of and from said Frazier title and possession of the Brooks League and especially the 160 acres described in Frazier's petition (R. 15-16). L. J. Frazier, wife of W. S. Frazier, was not a party to such suit.

On June 9, 1902, Houston Oil Company of Texas, having acquired the title of Texas Pine Land Association by deed dated July 31, 1901, conveyed to W. S. Frazier 80 acres of the Brooks League, including the 19 acres here involved, especially reserving and excepting "the oil and minerals upon or under the land herein conveyed." This conveyance was accepted and filed for record by Frazier (R. 5).

Among other defenses urged in this case, Respondents pleaded the judgment of 1899 in the Texas Pine Land Association case as res judicata of the title or claim of title of Frazier and wife as of that date and contended that whatever title the Fraziers might have had vested in Texas Pine Land Association by virtue of the judgment.

The Trial Court instructed a verdict and rendered judg-

ment in favor of Respondents but did not specify on what theory or defense such action was based. As shown by the Opinion of the Court of Civil Appeals (R. 9-10), that Court affirmed the judgment of the Trial Court on the theory that the 1899 judgment was res judicata and divested Frazier and wife of any title they might have had on the date of the judgment. In this connection the Court held that the wife of W. S. Frazier was not a necessary party to such suit and that the judgment against the husband alone was binding as against both husband and wife since the land involved, if owned by them, was community property.

Writ of Error was refused by the Supreme Court of Texas (R. 55) and Motion for Rehearing was overruled (R. 90).

Reply to Jurisdictional Grounds Relied on by Petitioners

The entire contention of Petitioners is that the land involved in the case of Frazier v. Texas Pine Land Association was the community homestead of W. S. Frazier and his wife, L. J. Frazier, and that the holding of the Texas courts that the judgment rendered in such case against Frazier alone is binding and conclusive against Frazier and wife, and Petitioners who hold under them, constitutes a denial of "due process of law" and is therefore in violation of Article 14, Section 1, of the CONSTITUTION OF THE UNITED STATES. In other words, they contend that Mrs. Frazier was denied "due process of law" because she did not have "her day in court."

Whether such holding is in violation of the "due process" provision of the Federal Constitution depends upon a determination of whether or not Mrs. Frazier was a necessary party to such suit in order to be bound and concluded by the judgment rendered therein. A determination of this question involves and requires a construction of the homestead pro-

visions of the Constitution and statutes of the State of Texas. If such homestead provisions, when construed by the Tribunal whose construction thereof is final and conclusive, do not require that the wife be a party to an ordinary trespass to try title suit (such as was the case of Frazier v. Texas Pine Land Association) involving the community homestead in order to render a judgment or decree against the husband alone valid and binding on and conclusive against both husband and wife then, certainly, it cannot be said that the wife, or any one holding under her, has been denied the protection of the "due process" provision of the Federal Constitution.

The question, then, is raised: What Tribunal is authorized to construe these provisions in order that such construction shall be final and conclusive?

Many decisions of this Honorable Court, as well as decisions of other Federal courts, answer the question posed, and the answer, under such decisions, is the Supreme Court of Texas.

In the case of SUPREME LODGE, KNIGHTS OF PYTHIAS, v. MEYERS, 265 U.S. 30, 32, 68 L. Ed. 885, 888, this Honorable Court affirmed a judgment of the Supreme Court of Nebraska. In the course of the opinion it is said:

> "Under the settled rule of this court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the state, fixing the meaning of the state legislation, as though such meaning had been specifically expressed therein."

This Honorable Court, in the case of BRINKERHOFF-FARIS TRUST & SAVINGS CO. v. HILL, 281 U.S. 673, 680, 74 L. Ed. 1107, 1113, on writ of certiorari to the Supreme Court of the State of Missouri, held:

> "It is true that the courts of a state have the supreme power to interpret and declare the written and unwrit-

> ten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on Federal questions; and that the mere fact that a state court has rendered an erroneous decision on the question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court."

In the case of ATCHISON, TOPEKA & SANTA FE RAILWAY CO. v. RAILROAD COMMISSION OF CALIFORNIA, ET AL., 283 U. S. 380, 390-391, 75 L. Ed. 1129, 1136, in reviewing a decision of the Supreme Court of California, this Honorable Court said:

> "The decision of the state court is conclusive so far as the constitution and laws of the state are concerned."

In affirming a judgment of the Supreme Court of the State of Wisconsin, in the case of SENN v. TILE LAYERS PROTECTIVE UNION, 301 U.S. 468, 477, 81 L. Ed. 1229, 1235, this Honorable Court held:

> "Those issues involved the construction and application of the statute and the Constitution of the State. As to them the judgment of its highest court is conclusive."

That the homestead rights, privileges and immunities here relied upon by Petitioners are rights, privileges and immunities created by the Constitution and statutes of the State of Texas cannot be doubted. Any homestead right that Mrs. Frazier enjoyed with respect to the land involved in the Texas Pine Land Association case was by virtue of the constitutional and statutory provisions of the State of Texas

and by virtue of nothing else. The Constitution, Code and laws of the United States make no provision for homestead exemptions or rights. Such were unknown to the common law.

In 40 C. J. S. 431, Section 2, it is said:

> "At common law there was no such thing as a homestead right, * * *. Homestead rights, therefore, exist only by virtue of constitutional and statutory provisions creating them. Such provisions have been enacted in nearly every state of the Union, the earliest being that enacted by the Republic of Texas in 1839."

And, again, in 40 C. J. S. 433, Section 3, it is said:

> "The homestead interest depends entirely on organic or statutory provisions, nothing like it being known at common law, * * * ; and there can, of course, be no greater right in the homestead property than is created by these provisions."

It thus clearly appears, from the authorities hereinabove quoted, that the homestead question raised in this case is one arising entirely out of the Constitution and statutes of Texas, that it must be determined by a construction of such Constitution and statutes, and the construction placed upon these by the Supreme Court of Texas is final and conclusive and will be accepted as such by the Supreme Court of the United States.

The early case of JERGENS v. SCHIELE, 61 Texas 255, decided by the Supreme Court of Texas in 1884, involved the question of the validity of a judgment in a former suit to which appellant's wife was not a party, the land involved being their homestead.

In holding that the wife was not a necessary party to

such suit and that the judgment rendered therein was binding and conclusive of the issue adjudicated, the court said:

> " * * *. To such a suit the wife was not a necessary party, and her presence in the cause would not have made the decree rendered in it any more binding than if obtained against the husband alone, unless she was an essential party by reason of the fact that the homestead was located on the premises.
>
> "If there was any defense that could have been urged growing out of her homestead rights which would have defeated the action, then she was a necessary defendant in the cause."

In holding that the wife was not a necessary party to a suit involving the homestead and that she was bound by an adverse judgment against her husband in such case, the Commission of Appeals, in the case of COOLEY v. MILLER, ET AL., 228 S.W. 1085, 1086, in which the judgment of the Commission was adopted by and entered as the judgment of the Texas Supreme Court, held:

> "It is not necessary to cite authority upon the now elementary proposition that the wife is not a necessary party to an action against the husband to try the title to, affect an interest in, or foreclose a lien upon community real estate. In determining whether the wife's homestead interest alone renders her a necessary party to an action affecting property impressed with the homestead exemption, the test laid down by our Supreme Court is whether the plea of homestead would in itself be a defense to the suit."

There are many, many other cases by the Supreme Court and the various Courts of Civil Appeals of Texas in which the legal principle as set forth in the above cases is adhered

to. We deem it neither necessary nor proper to cite and quote from such cases here, some of which are cited and discussed in Respondents' Answer to Petition for Writ of Error in the Supreme Court of Texas (R. 37-42) and we call attention to that portion of the Record.

The very holding of the Supreme Court of Texas in the case here under consideration, as evidenced by the refusal of writ of error, is such a construction of the homestead provisions of the Constitution and statutes of the State of Texas. The holding in this case is not in conflict with the holding of the Supreme Court of Texas in any case heretofore decided by ~~this~~ Court.

It is quite true that in some types of cases involving homestead rights in Texas the wife is a necessary party and judgments rendered against the husband alone in such cases are void and are not binding and conclusive. Such cases are those involving the foreclosure of an unauthorized lien against the homestead, those involving a simulated sale of the homestead and those involving foreclosure of a lien not executed by the wife in accordance with the statutes of Texas. All of the cases cited by Petitioners in support of their contention are cases falling within the above categories with the exception of MEXIA v. LEWIS, ET AL., 21 S.W. 1016, and BEHRENS v. BEHRENS, 186 S.W. (2d) 695, neither of which has the approval of the Supreme Court of Texas and both of which are discussed in the Opinion in this case. All of such cases are discussed in Respondents' Answer to Petition for Writ of Error in the Supreme Court of Texas (R. 42-47), and attention is respectfully called to that portion of the Record.

The case of Frazier against Texas Pine Land Association did not involve a lien or simulated sale or transaction. It was, as shown by the petition, an ordinary suit in trespass to try

title brought by Frazier, who had no record or paper title but whose entire claim of title was by virtue of the Texas ten-year limitation statute, against Texas Pine Land Association, the owner of the record title to the land involved, in which the defendant filed a cross-action. The judgment rendered was not based upon any agreement but, as shown by the judgment itself (R. 15-16), was a judgment rendered by the court after "having heard the pleadings read and the evidence submitted." The fact that the land involved was claimed by the Fraziers as their homestead would not have *in itself* constituted a cause of action or a ground of defense.

The fact that the judgment contains the recital "the plaintiff thereupon not appearing further to prosecute this cause" does not render the judgment less valid, binding and conclusive of the issue there adjudicated, such issue being that Frazier had no title to the land involved but that the title was in his adversary. A similar situation was passed on by the Commission of Appeals of the Supreme Court of Texas in the case of STARK v. HARDY, ET AL., 29 S.W. (2d) 969, 969, wherein it was held:

> "The mere announcement of the plaintiffs that they would prosecute their suit no further, did not divest the court of jurisdiction of the parties and the subject-matter of the suit; the court therefore had the power to render the judgment it did."

There is another well settled principle of law that has been followed by this Honorable Court uniformly. This is the principle that the Supreme Court of the United States, and other Federal Courts, will adopt and follow the construction of the highest court of the state respecting state statutes on which the title to land depends. In the case of WHITE v. BURNLEY, 61 U.S. 235, 251, 15 L. Ed. 886, 890, this Court said:

> "We have endeavored carefully to follow the doctrines of the Supreme Court of Texas in this opinion, because we are bound to follow the settled adjudications of that State in cases affecting titles to lands there."

Other cases announcing the same principles are:

City of Chicago v. Robbins, 67 U.S. 418, 17 L. Ed. 289;
Kibbe v. Ditto, 93 U.S. 674, 23 L. Ed. 1005;
O'Connor v. Texas, 202 U.S. 501, 50 L. Ed. 1120;
Tyler v. United States, 281 U.S. 497, 74 L. Ed. 991.

In the interest of brevity, we will not discuss the cases cited by Petitioners on pages 15-18 of their Petition for Writ of Certiorari. It is true that in such cases this Honorable Court held that under the facts there presented the "due process of law" provision of the Federal Constitution had been violated. We say, however, that those cases presented entirely different factual and legal situations to the factual and legal situation presented in the case under consideration and are not applicable.

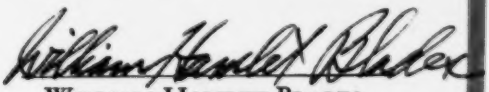
Respondents respectfully submit that under the holdings of the Supreme Court of Texas, in construing the homestead provisions of the State Constitution and statutes, Mrs. L. J. Frazier had no such rights under the homestead laws as rendered it necessary that she be made a party to the Texas Pine Land Association case. Therefore, she was not denied "due process of law" or any other protection, right, privilege or immunity guaranteed to her by the 14th Amendment to the Constitution of the United States.

Conclusion

Respondents respectfully submit that no Federal question is presented requiring a review of this case by this Honorable

Court and Respondents pray that Writ of Certiorari be denied.

Respectfully submitted,



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